No. 91-1393

In The

Supreme Court of the United States

October Term, 1992

A.L. LOCKHART,

Petitioner,

v.

BOBBY RAY FRETWELL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KENTUCKY, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General
MARK L. KROTOSKI
*Special Assistant Attorney General
1515 K Street, Suite 603
Sacramento, CA 95814
Telephone: (916) 324-5497
Attorneys for Amici
*Counsel of Record
July 24, 1992

[additional counsel on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNSEL

James H. Evans
Attorney General
of Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130
(205) 242-7300

Charles E. Cole
Attorney General of
Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-3600

Grant Woods
Attorney General of
Arizona
1275 West Washington
Phoenix, AZ 85007
(602) 542-5025

Gale A. Norton
Attorney General of
Colorado
110 Sixteenth Street
10th Floor
Denver, CO 80202
(303) 620-4500

Richard N. Palmer
Chief State's Attorney
State of Connecticut
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Charles M. Oberly, III
Attorney General of
Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-3838

Robert A. Butterworth
Attorney General
of Florida
The Capitol
Tallahassee, FL 32399-1050
(904) 487-1963

Larry EchoHawk
Attorney General of Idaho
Statehouse, Room 207
Boise, ID 83720
(208) 334-2400

Chris Gorman
Attorney General
of Kentucky
State Capitol, Room 116
Frankfort, KY 40601
(502) 564-7600

Marc Racicot
Attorney General of
Montana
Justice Building
215 North Sanders
Helena, MT 59620
(406) 444-2026

Don Stenberg
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Building
Lincoln, NE 68509-8920
(402) 471-2682

Frankie Sue Del Papa
Attorney General of
Nevada
Heroes Memorial
Building
Carson City, NV 89710
(702) 687-4170

Robert J. Del Tufo
Attorney General
of New Jersey
Department of Law &
Public Safety
Richard J. Hughes
Justice Complex
Trenton, NJ 08625-0086
(609) 292-4925

Lacy H. Thornburg
Attorney General of
North Carolina
P.O. Box 629
Raleigh, NC 27602-0629
(919) 733-3377

Charles S. Crookham
Attorney General of
Oregon
100 Justice Building
Salem, OR 97310
(503) 378-4402

Ernest D. Preate, Jr.
Attorney General
of Pennsylvania
16th Floor,
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

T. Travis Medlock
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

Mark Barnett
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

Jeffrey L. Amestoy
Attorney General
of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

KENNETH O. EIKENBERRY
Attorney General of
Washington
Correction Division
P.O. Box 40116
Olympia, WA 98504-0116
(206) 586-1445

JOSEPH B. MEYER
Attorney General
of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

QUESTIONS PRESENTED

I. Whether the "prejudice" component of the Sixth Amendment right to effective assistance of counsel is established: (1) when counsel does not make an objection based upon prevailing federal appellate court precedent *at the time of the state trial*; (2) the federal appellate court precedent is subsequently overruled *by the time of federal habeas review*; and (3) the retroactive application of the new precedent does not affect the fundamental fairness or reliability of the state trial?

II. Whether States should be able to rely upon new precedent on collateral review when a habeas petitioner contends that his trial counsel failed to raise an objection that would have been potentially meritorious at the time of the state proceeding, but would no longer be valid in light of the new precedent?

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INTEREST OF *AMICI*

Amici States have a substantial interest in defending state court judgments which are *proven* to be valid based upon subsequent precedent. Ineffective assistance of counsel claims are raised in a majority of federal habeas corpus petitions challenging presumptively valid state court judgments, particularly in capital cases. To establish an ineffectiveness claim, habeas petitioners must show that the attorney's performance

was both deficient and prejudicial, under *Strickland v. Washington*, 466 U.S. 668 (1984). This case presents a fundamental question concerning the *prejudice* component of this standard.

More critically, the issue is whether on collateral review the State may defend its judgment by relying on precedent that was rendered after the state trial court judgment. If the States cannot rely on subsequent precedent, then habeas petitioners will be able to overturn their state court convictions and sentences based upon a "constitutional windfall" even though under current precedent the convictions and sentences would be deemed both fundamentally fair and reliable. Unless the Eighth Circuit majority holding is reversed, it will have serious ramifications on the administration of justice; the criminal justice interests in finality, comity, and judicial economy; the *Teague* doctrine; and the application of the prejudice component of the *Strickland* standard.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

In August, 1985, respondent Bobby Ray Fretwell was convicted by an Arkansas jury of capital felony murder. At the bifurcated sentencing hearing, the state trial court instructed the jury on two aggravating circumstances requested by the State and one mitigating circumstance urged by Fretwell's attorney. Fretwell's attorney did not object to either of the two aggravating circumstances instructions. The second of these instructions, at issue here, provided that the capital felony was committed for the purposes of pecuniary gain. A sentence of death was pronounced after the jury found the pecuniary gain aggravating circumstance was present and there were no mitigating circumstances. Fretwell's conviction and sentence were affirmed by the Arkansas Supreme Court, *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630, 634 (Ark. 1986), and his state collateral challenge was unsuccessful. *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180, 181 (Ark. 1987) (per curiam).

The U.S. District Court granted habeas relief on the ground that Fretwell was denied effective assistance of counsel under the Sixth and Fourteenth Amendments when his counsel failed to object to the pecuniary gain aggravating circumstance instruction based upon *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). Seven months before Fretwell's trial, the Eighth Circuit held in *Collins* that the pecuniary gain aggravating circumstance could not be considered in the sentencing phase of robbery/murder cases because it duplicated an element of the offense of robbery/murder established in the guilt phase. However, before federal habeas review in this case, the Eighth Circuit overruled its *Collins* decision in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).[1]

Even though *Collins* was overruled *at the time of federal habeas review*, the U.S. District Court issued the writ in this case because *Collins* was the law of the circuit *at the time of the state trial*. *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1338 (E.D. Ark. 1990). A divided panel of the Eighth Circuit affirmed the issuance of the writ. *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). This Court granted writ of certiorari. *Lockhart v. Fretwell*, 112 S.Ct. 1935, 118 L.Ed.2d 542 (1992).

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[1] The *Perry* court concluded that *Collins* was inconsistent with this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which held that the same element could constitutionally be considered as part of the offense during the guilt phase and also as an aggravating circumstance during the sentencing phase of a capital trial. In *Lowenfield*, this Court concluded that the required narrowing function under the Eighth Amendment could be fulfilled by either the Legislature when it defined the substantive offense or by jury findings of aggravating circumstances during the penalty phase. *See id.* at 246. Although *Lowenfield* involved a Louisiana statute and *Collins* concerned an Arkansas statute, the Eighth Circuit in *Perry* concluded the state sentencing schemes were "indistinguishable in any significant detail." *See Perry*, 871 F.2d at 1393; *see also id.* (concluding "that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*," and holding *Collins* was "overruled by *Lowenfield*"); and note 17, *infra*. Among other things, the *Fretwell* majority attempted to distinguish the Louisiana statute in *Lowenfield* from the Arkansas statute, notwithstanding the Eighth Circuit's holding in *Perry*. *See Fretwell*, 946 F.2d at 575-77.

SUMMARY OF ARGUMENT

Most federal habeas corpus petitions, particularly in capital cases, contain claims alleging ineffective assistance of counsel. This case offers the Court an opportunity to provide further guidance on the prejudice component of the Sixth Amendment standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This case asks, in evaluating prejudice, whether the original precedent *at the time of the state proceeding* or the new precedent *at the time of federal habeas review* should be applied on collateral review when the fundamental fairness of the proceeding would not be affected by the retroactive application of the new precedent. As Justice Powell correctly framed the prejudice issue, "only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair." *Kimmelman v. Morrison*, 477 U.S. 365, 395 (1986) (Powell, J., concurring)

As this Court has already noted, "The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland*, 466 U.S. at 697. Here, the Eighth Circuit vacated a state court decision because the respondent's trial counsel did not raise an objection based upon a federal appellate court decision that had since been overruled. The prejudice test proposed by Justice Powell in *Kimmelman*, 477 U.S. at 391-98, best advances the objectives of the Sixth Amendment and federal habeas review by focusing on the fairness and reliability of the proceeding, rather than simply grading counsel for errors that would make no difference today.

Unless this Court reverses the Eighth Circuit majority ruling, respondent will have obtained what the dissent accurately called a "constitutional windfall." The "windfall" occurs where, as here, the habeas petitioner obtains the benefit of a precedent in his favor even though that precedent has been overruled and despite the fact that the state court trial

was reasonable and fair under current constitutional standards. This windfall thwarts the State's ability to enforce its criminal laws and its interest in obtaining finality.

This case also concerns the ability of the States to uphold state court judgments by defending against collateral attacks based upon precedent which has ultimately been shown to be valid even though the prior related precedent may have been questioned at the time of the initial proceeding. This issue has not previously been addressed by the Court and was not raised in the related retroactivity analysis of *Teague* and its progeny. The issue presented under the *Teague* doctrine is when decisional law should *not* be retroactively applied. This case presents the converse situation: when *should* decisional law be retroactively applied.

Three scenarios are considered in this brief which explore the ramifications of a rule which would enable the State to rely upon subsequent precedent in limited situations on collateral review. Such a rule is consistent with the objectives of the *Teague* doctrine to preserve the integrity of state court judgments and promote the criminal justice interests in finality, comity and judicial economy. Just as the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions," *Butler v. McKellar*, 494 U.S. 407, 414 (1990), then, too, state court judgments which are ratified by subsequent precedent should similarly be vindicated. Only in this manner can the integrity of state court judgments be respected consistent with the principles underlying the *Teague* doctrine.

ARGUMENT

I. Justice Powell's Standard in *Kimmelman* for Determining Prejudice Should Govern Ineffective Assistance of Counsel Claims and Would Bar "Constitutional Windfalls"

In *Kimmelman v. Morrison*, Justice Powell noted that "it would shake [the right to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth

Amendment protects criminal defendants against errors that merely deny those defendants a windfall." 477 U.S. 365, 397 (1986) (Powell, J., concurring). In this case, the Eighth Circuit dissent correctly criticized the majority for affording respondent Fretwell a "constitutional windfall" by granting habeas relief on Sixth Amendment grounds. *Fretwell*, 946 F.2d at 579 (Loken, J., dissenting).

In *Strickland v. Washington*, this Court established two prongs – a performance component and prejudice component – both of which must be demonstrated in order for a defendant or habeas petitioner to obtain Sixth Amendment relief for ineffective assistance of counsel. *See* 466 U.S. 668, 687, 697 (1984). The parties have not disputed that the performance component has been satisfied in this case.[2] The central issue presented is whether the failure to object to the aggravating circumstance instruction – based upon prevailing federal appellate authority at the time of the state trial which had been reversed at the time of federal habeas review – *prejudiced* the outcome of the sentencing hearing.

In concluding the prejudice component was met, the Eighth Circuit majority emphasized that it was compelled to apply the law in effect *at the time of the state proceeding* even

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[2] While the petitioner may have conceded this point below, the *sole* basis for raising an objection during the state sentencing proceeding was premised on the now discredited and overruled *Collins* decision. *See* note 6, *infra* (citing numerous decisions rejecting or questioning *Collins* rule). The unfounded presumption of the Eighth Circuit majority was that Eighth Circuit precedent was necessarily binding on the Arkansas state trial court. *See Fretwell*, 946 F.2d at 577. Consequently, the Eighth Circuit majority "graded" defense counsel's performance in light of overruled Eighth Circuit precedent. Because the state court was not obligated to follow the *Collins* rule, the performance prong of the *Strickland* standard cannot be demonstrated. *See* text immediately following note 6, *infra*.

In fact, it may be in light of this Court's decision in *Jurek v. Texas*, 428 U.S. 262 (1976), that defense counsel decided not to assert a *Collins* objection. *See* note 17, *infra*. Further, the failure to object or assert an issue does not *automatically* establish the performance component. *See, e.g., Smith v. Murray*, 477 U.S. 527, 535-36 (1986). Nonetheless, the performance issue may not need to be reconciled since respondent is unable to establish *both* the performance and prejudice components in order to obtain Sixth Amendment relief. *See Strickland*, 466 U.S. at 697.

though this precedent had been subsequently overturned by the Eighth Circuit. *Fretwell*, 946 F.2d at 577 & n.8. As the dissent rightfully noted, "By focusing only on the probable effect of counsel's error *at the time of Fretwell's sentencing*, the majority *misses the broader and more important point* that his sentencing proceeding reached *neither an unreliable nor an unfair result*." *Id.* at 579 (Loken, J., dissenting) (emphasis added) (citing *Kimmelman*, 477 U.S. at 396-97 (Powell, J., concurring)).

Under the performance component of the *Strickland* test, this Court has noted that a reviewing court should assess "the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Strickland*, 466 U.S. at 690 (emphasis added); *see also Kimmelman*, 477 U.S. at 381, 385. While this Court has not addressed the point of time for assessing the prejudice component, this Court has made clear that the *Strickland* standard should not be mechanically applied and that "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696 (emphasis added); *see also Kimmelman*, 477 U.S. at 395 (Powell, J., concurring) (reiterating that the standard "should not be applied too mechanically").

The standard propounded by Justice Powell was not applied to the facts presented in *Kimmelman* as it was not briefed by the parties nor considered by the lower federal courts. *Kimmelman*, 477 U.S. at 397-98 (Powell, J., concurring). This case presents an opportunity for this Court to hold, as Justice Powell urged in *Kimmelman*, that a habeas "windfall" should never be granted under the prejudice component of the Sixth Amendment *Strickland* standard where the fairness or reliability of the proceeding has not been placed in issue. *See id.* at 395, 396, 397 (Powell, J., concurring).[3]

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[3] Indeed, this case presents a more compelling reason for the adoption of Justice Powell's prejudice test. In *Kimmelman*, the ineffectiveness claim was based upon trial counsel's failure to file a Fourth Amendment suppression motion. In that case, the motion was still potentially meritorious under existing precedent

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II. The Eighth Circuit Majority Ruling Fails To Advance The Objectives Of Federal Habeas Review And The Sixth Amendment and Undermines The Principles Supporting The Retroactivity Analysis Adopted By This Court

A. The Ruling Does Not Promote the Objectives of Collateral Review

Neither of the two central purposes of federal habeas review is advanced by the Eighth Circuit majority application of the repudiated *Collins* rule.[4] *First*, habeas review advances a "deterrence function" by furnishing a "necessary additional incentive" to state courts to ensure federal rights are applied consistent with established constitutional standards at the time of their application.[5] To the extent that *Collins* was overruled and discredited, it is the Eighth Circuit majority which ensured an inconsistent application of constitutional standards. *See* note 17, *infra*.[6]

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at the time of collateral review. In contrast, in this case there is no dispute that the failure to object to the aggravating circumstance instruction was no longer meritorious. Only because the Eighth Circuit majority insisted on applying the overruled precedent was respondent able to obtain habeas relief.

[4] Although the same standards apply in evaluating ineffectiveness claims on direct or collateral review, *Strickland*, 466 U.S. at 697-98, most ineffectiveness claims arise on collateral review. *See Kimmelman*, 477 U.S. at 378, 379 n.3.

[5] *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) (quoted in *Teague*, 489 U.S. at 306-07 (plurality opinion)); *see also Sawyer v. Smith*, 497 U.S. 227, ___, 110 S.Ct. 2822, 2827, 2830, 111 L.Ed.2d 193, 206, 209 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Butler v. McKellar*, 494 U.S. 407, 413 (1990); *Hunt v. Vasquez*, 899 F.2d 878, 880 (9th Cir. 1990) (considering deterrence function of federal habeas review on ineffective assistance of counsel claim seeking retroactive application of overruled state court ruling).

[6] In fact, not only did the Eighth Circuit finally overrule *Collins* in *Perry*, but numerous other courts, including the Arkansas Supreme Court, have either explicitly rejected or questioned the *Collins* rule. The Arkansas Supreme Court never followed *Collins* and applied *Lowenfield* retroactively since "appellants [are not] entitled to preserve in place a principle of law which has been held to be erroneous." *Ruiz v. State of Arkansas*, 299 Ark. 144, 772 S.W.2d 297, 302 (Ark.

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Clearly, the *sine qua non* of the majority opinion is that the Eighth Circuit precedent in *Collins* (even though subsequently overruled in *Perry*) was binding on the state court at the time of the trial. State courts are not bound by lower federal courts in interpreting federal constitutional law. *See, e.g.*, 1 Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance & Procedure* § 1.6(c), at 33 (3d ed. 1986). For example, the *Collins* rule would clearly not have been binding on the Arkansas courts if it had been rendered in another circuit; the fact that *Collins* was decided by the Eighth Circuit should not make a difference. In our national judicial system, state courts hold a co-equal status with the federal judiciary and are as competent in applying and deciding federal principles. *See, e.g., Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 210-11; *Stone v. Powell*, 428 U.S. 465, 495 n.35. The duty of the Arkansas state trial court was therefore not to apply Eighth Circuit precedent (as the *Fretwell* majority explicitly dictated, *see Fretwell*, 946 F.2d at 577 & n.8), but to apply, reasonably and in good faith, existing constitutional rules. *Cf. Butler*, 494 U.S. at 414.

At the time of federal habeas review, *Collins* obviously was not a correct statement of law. Rather than serving the deterrence function, the Eighth Circuit majority's insistence

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1989) (and citing several Arkansas Supreme Court cases rejecting the *Collins* rationale).

Other federal courts have expressly criticized and rejected *Collins*. *See, e.g., Rault v. Butler*, 826 F.2d 299, 306-07 (5th Cir.) (citing several Fifth Circuit cases rejecting *Collins*), *cert. denied*, 483 U.S. 1042 (1987); *Berry v. Phelps*, 819 F.2d 511, 516-17 (5th Cir. 1987) ("No circuit court has followed the Eighth Circuit decisions in *Collins*, and we have expressly rejected it on several occasions.") (citations omitted); *Ritter v. Thigpen*, 668 F. Supp. 1490, 1495-96 (S.D. Ala. 1987) (noting "the law in the Eleventh Circuit, both before and after the *Collins* decision, is just the opposite") (and cases cited therein).

At least one other circuit court has questioned and distinguished the *Collins* holding. *See, e.g., McKenzie v. Risley*, 842 F.2d 1525, 1539 n.30 (9th Cir.) ("We read *Collins* as grounded in the peculiar statutory scheme employed by Arkansas to define capital murder. In any event, we note that *Collins* did not discuss *Jurek* and was decided prior to *Lowenfield*."), *cert. denied*, 488 U.S. 901 (1988).

on applying *Collins* undeniably and inexplicably confers a constitutional windfall on respondent.

Second, habeas review "seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[7] Respondent Fretwell's innocence would not be affected by the application of *Perry* on federal habeas review.

B. The Ruling Erodes the Principles Underlying the *Teague* Doctrine

Substantial criminal justice interests – including the interests in finality and comity – dictate that a presumptively valid conviction and sentence should not be disturbed on collateral review unless a showing can be made that the state prisoner is in custody in violation of constitutional or federal rights, 28 U.S.C. § 2254(a), and this showing conforms with established requirements for federal habeas review.[8] These interests are reflected in and promoted by the framework of analysis adopted by this Court in determining whether and when to apply decisional law retroactively. These principles should be consistently maintained in this case.

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[7] *Desist*, 394 U.S. at 262 (Harlan, J., dissenting); *see also Stone*, 428 U.S. at 491 nn.30 & 31; *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (Powell, J., concurring) ("Habeas corpus indeed should provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty."); *Hunt*, 899 F.2d at 880 (considering role of innocence on federal habeas review on ineffective assistance of counsel claim seeking retroactive application of overruled state court ruling).

[8] Many of these habeas requirements promote the criminal justice interests in comity and finality. *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640, 656 (1991) (applying independent and adequate state ground doctrine); *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 1469, 113 L.Ed.2d 517, 542, 543 (1991) (abuse of the writ doctrine); *Teague v. Lane*, 489 U.S. 288, 299-310 (1989) (plurality opinion) (general doctrine against retroactive application of "new rules" on collateral review); *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986) (procedural default doctrine); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) (general bar against successive petitions); *Rose v. Lundy*, 455 U.S. 509, 516, 518 (1982) (exhaustion doctrine under 28 U.S.C. §§ 2254(b), (c)); *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (presumption of correctness to state court findings of fact under 28 U.S.C. § 2254(d)).

Under our criminal justice system, a state defendant may obtain the benefit of the retroactive application of *any* new rule at *any* time during the direct review process before the conviction becomes final. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). However, upon the conclusion of the direct review process, *see id.* at 321 n.6, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Strickland*, 466 U.S. at 697 (noting "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment").

The *Teague* doctrine advances the criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system.[9] Under the *Teague* doctrine, "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States) may not be retroactively applied or announced on collateral review unless the rule falls within one of two exceptions.[10] Concomitantly, under *Teague* and its progeny,

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[9] *See Stringer v. Black*, 503 U.S. at ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 377 (1992) ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (noting finality concerns under retroactivity doctrine are also applicable in capital sentencing proceedings); *Teague*, 489 U.S. at 308 (noting the criminal justice interests of comity and finality bear directly on the question of the scope of habeas review).

The heart of the *Teague* doctrine is premised upon the nature, function, scope and purpose of collateral review. *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle*, 494 U.S. at 488; *Butler*, 494 U.S. at 413. As Justice Harlan noted, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the *purposes for which the writ of habeas corpus is made available*." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2830, 111 L.Ed.2d at 209; *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306).

[10] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 376; *Sawyer*, 497 U.S. at ___,

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old rules (or rules which are not "new" within the meaning of *Teague*) may be considered on collateral review. *See, e.g., Penry*, 492 U.S. at 319-28 (considering and applying rule sought by petitioner which was deemed not "new" under the *Teague* doctrine). Therefore, only under limited circumstances (i.e., where the fundamental fairness and reliability of the proceeding is in issue) may "new" decisional law be retroactively applied to upset a presumptively valid state court judgment.

This case raises a similar question regarding the application of precedent to set aside a presumptively valid state court sentence. By insisting on the application of *overruled* precedent, the Eighth Circuit majority disregarded comity and federalism concerns and the interest in finality. The costs of this constitutional windfall for the respondent on the criminal justice system simply cannot be rationalized, especially when the windfall relief does not promote the fundamental fairness and reliability of the proceeding in any manner.

Viewed in this context, the concerns addressed by the *Teague* doctrine and the Powell-*Kimmelman* standard intersect. In essence, *Teague* and its progeny hold that a habeas petitioner should not obtain a "constitutional windfall" which would result from the retroactive application of a "new rule" on collateral review because such a windfall cannot be warranted in light of its effect on the interests in finality and comity. For identical reasons, the rule proposed by Justice

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110 S.Ct. at 2831, 111 L.Ed.2d at 211; *Butler*, 494 U.S. at 412; *Penry*, 492 U.S. at 313, 329.

The *Teague* doctrine, which is not an absolute bar to the announcement or application of new rules of law on collateral review, contains two important exceptions: (1) rules that place a class of conduct beyond the reach of the criminal law, or which prohibit the imposition of certain punishment for certain defendants because of their status or offense; and (2) watershed rules of criminal procedure concerning the accuracy and fairness of a criminal proceeding. *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211; *Saffle*, 494 U.S. at 494-95; *Butler*, 494 U.S. at 415-16; *Penry*, 492 U.S. at 329-30; *Teague*, 489 U.S. at 311-12 (plurality opinion).

Powell in *Kimmelman* avoids constitutional windfalls to petitioners on Sixth Amendment grounds. *Compare Teague*, 489 U.S. at 309-10 *with Kimmelman*, 477 U.S. at 397 (Powell, J., concurring). Further, the *Teague* doctrine seeks to vindicate reasonable state court interpretations of constitutional law at the time of the state trial. *Butler*, 494 U.S. at 414. In this case, this Court can vindicate a challenged state court sentence which has been validated by subsequent precedent, notwithstanding any alleged deficiency of defense counsel at the time of the state trial.

C. The Ruling Fails to Advance the Objectives of the Sixth Amendment Right to Effective Counsel

As this Court noted in *Strickland*, the substantive content of the Sixth Amendment right is guided by its purpose "to ensure a fair trial."[11] The key to promoting a fair proceeding is the adversarial process: "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685; *see also Kimmelman*, 477 U.S. at 374 ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance

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[11] 466 U.S. at 686; *see also Burger v. Kemp*, 483 U.S. 776, 788 (1987); *Kimmelman*, 477 U.S. at 392-93 (noting "the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's *right to a fundamentally fair trial* – a trial in which the determination of guilt or innocence is 'just' and 'reliable' ") (Powell, J., concurring) (citation omitted); *Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the *fundamental right to a fair trial*.") (emphasis added); *id.* at 689; *id.* at 691-92; *id.* at 696 ("the ultimate focus of inquiry must be on the *fundamental fairness of the proceeding* whose result is being challenged") (emphasis added); *id.* at 697 ("An ineffectiveness claim . . . is an attack on the *fundamental fairness* of the proceeding whose result is challenged.") (emphasis added); *id.* at 700 (An ineffectiveness claim requires a habeas prisoner to show that "the justice of his sentence was rendered *unreliable by a breakdown in the adversary process* caused by deficiencies in counsel's assistance.") (emphasis added).

between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."); *Strickland*, 466 U.S. at 686-87 (noting defense counsel fulfills an adversarial role in a capital sentencing proceeding); *id.* at 696.

Outside of a narrow class of errors in which prejudice is presumed,[12] the effect of most defense counsel errors on the proceeding must be assessed in light of their impact on the proceeding. Just as "[t]here are countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, errors of counsel may arise in an "infinite" manner. *Id.* at 693. Certainly, to some extent, "*any* error . . . 'impairs' the presentation of the defense." *Id.* (emphasis added). But not every error by defense counsel calls into question the outcome of the adversarial hearing.

To address these concerns, the prejudice standard serves the Sixth Amendment purpose by supplying a screening function: permitting habeas relief *only* where the fundamental fairness or reliability of the trial is implicated by the alleged error. In the absence of this threshold showing, it cannot be said that the challenged error was "sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.* In the context of a sentencing hearing, the prejudice determination turns on "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

The habeas petitioner has the burden of establishing prejudice. *Id.* at 693, 694, 696. In this case, the focus of the Sixth Amendment inquiry should be whether the respondent has met his burden by showing that retroactive application of the new precedent in *Perry* would render his sentence fundamentally unfair or unreliable. Where retroactive application of precedent would affect the fundamental fairness of the

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[12] This is not a case where prejudice is presumed, such as an actual or constructive denial of the assistance of counsel, or where counsel holds an actual conflict of interest leading to a breach of the duty of loyalty. *See Strickland*, 466 U.S. at 692; *see also Kimmelman*, 477 U.S. at 381 n.6; *id.* at 395 n.2 (Powell, J., concurring).

proceeding, the new precedent should not be applied retroactively. As Justice Powell put it, "only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair." *Kimmelman*, 477 U.S. at 395 (Powell, J., concurring); *see also Nix v. Whiteside*, 475 U.S. 157, 184-85 (1986) (Blackmun, J., concurring) (counsel's efforts to preclude perjured testimony could not cast doubt on the reliability of the trial).

Ordinarily a reviewing court might assess prejudice in the context of precedent prevailing at the time of the trial. But as this Court has already recognized, the *Strickland* standard is not to be mechanically applied. *Strickland*, 466 U.S. at 696; *see also Kimmelman*, 477 U.S. at 395 (Powell, J., concurring). Only in limited circumstances where prejudice may be presumed is a "fairly rigid rule" of prejudice applied. *Strickland*, 466 U.S. at 692; *see also* note 12, *supra*. This case demonstrates, under the prejudice component, why artificial application of precedent available at the time of the state proceeding is inconsistent with the objectives of federal habeas review and the Sixth Amendment. To apply *Collins* rigidly on collateral review only perpetuates the erroneous holding of that opinion, which has been rejected by other courts considering the issue. *See* note 6, *supra*.

In this case, respondent has not satisfied his burden of establishing prejudice because he has not met the threshold showing that the sentencing proceeding was fundamentally unfair or unreliable as a result of his trial counsel's error. The record shows that respondent's defense counsel did not object to the aggravating circumstance instruction during the sentencing phase of the state trial. The only legal basis for raising an objection rested upon the *Collins* holding. However, precedent of this Court, and other federal courts, as well as the Arkansas Supreme Court and a subsequent ruling of the Eighth Circuit, have removed any basis that may have existed under *Collins* for asserting an objection during the state sentencing proceeding. *See* note 6, *supra*, & note 17, *infra*.

Consequently, the challenged error in this case is the type which ultimately "had no effect on the judgment." *Strickland*, 466 U.S. at 691. The adversarial balance has not been upset where defense counsel fails to raise an objection that subsequent precedent has rendered meritless. Under these circumstances, neither the reliability nor the fairness of the sentencing proceeding has been called into question.

D. Unless the "Constitutional Windfall" Countenanced By The Eighth Circuit Majority Is Reversed, Substantial And Unjustifiable Costs To The Criminal Justice System Will Be Incurred

Federal habeas review and the Sixth Amendment guarantee of the right to effective assistance of counsel both seek to ensure that the petitioner has received a constitutionally fair and reliable trial. Both the *Teague* doctrine and the Powell-*Kimmelman* standard preserve these guarantees without compromising the interests of the criminal justice system in finality, comity and judicial economy. In this manner, they minimize unjustifiable costs on the administration of justice.[13] Under both standards, only when the requisite showing has been made should habeas relief be granted.

For example, granting habeas relief in this case merely on the basis of a non-prejudicial windfall certainly does not

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[13] In determining the scope of collateral review, several decisions of this Court have considered the "costs" of collateral review on our criminal justice system and on the States. *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2559, 115 L.Ed.2d at 662 (noting "most of the *price* paid for federal review of state prisoner claims is paid by the States") (emphasis added); *McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1468, 113 L.Ed.2d at 542 (discussing "the significant costs of federal habeas corpus review"); *Teague*, 489 U.S. at 310 (noting costs imposed on States from retroactive application of new rules on habeas review) (citation omitted); *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (noting collateral review "entails significant *costs*") (emphasis added); *see also Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring) ("The *costs* imposed upon the State by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.") (emphasis added).

advance the interest in finality.[14] The granting of habeas relief in this case disregards sovereignty and comity interests, as the enforcement of state law is frustrated. *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543; *Teague*, 489 U.S. at 309 (plurality opinion).

Federal-state relations are particularly exacerbated where the State is precluded from resentencing Fretwell, as the Eighth Circuit majority expressly held in remanding the case. *See Fretwell*, 946 F.2d at 577-78. The interest in judicial economy is also not promoted, especially where the fundamental fairness of the initial sentencing hearing has not been questioned, and limited judicial resources have been unnecessarily expended.[15] For these reasons, the Eighth Circuit majority ruling, if left undisturbed, may, as applied in some cases, "be more intrusive than the enjoining of criminal prosecutions." *Teague*, 489 U.S. at 310 (citing *Younger v. Harris*, 401 U.S. 37, 43-54 (1971)).

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[14] *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (noting the prejudice requirement in challenging the validity of a guilty plea on grounds of ineffectiveness "serve[s] the fundamental interest in the finality of guilty pleas"); *but see Strickland*, 466 U.S. at 694 (in determining that the prejudice standard for ineffectiveness claims should not be governed by a preponderance of the evidence standard, noting that the interest in finality must be counterbalanced to some extent by the interest in reliability).

Numerous opinions of this Court and commentators have noted the role of finality in the federal habeas process. *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1468-69, 113 L.Ed.2d at 542-43; *Teague*, 489 U.S. at 309 (plurality opinion); *Engle*, 456 U.S. at 127; *Stone*, 428 U.S. at 491 n.31; *Mackey*, 401 U.S. at 683, 690-91 (Harlan, J., concurring and dissenting); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-51 (1963).

[15] *See Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318, 329 (1992) (noting interest in judicial economy); *McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543 (noting "heavy burden on scarce federal judicial resources" which impacts the ability "of the system to resolve primary disputes"); *Stone*, 428 U.S. at 491 n.31 (noting impact of habeas review on "the most effective utilization of limited judicial services"); *Schneckloth*, 412 U.S. at 261 (Powell, J., concurring) ("After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.").

III. Repercussions on the *Teague* Doctrine and the *Strickland* Standard

The *Teague* doctrine addresses the frequent situation when a habeas petitioner seeks the benefit of a "new rule" of constitutional law to overturn his conviction or sentence – a rule not available when the state conviction became final. *Griffith*, 479 U.S. at 321 n.6. The *Teague* doctrine does not deal with the converse situation: when the State asserts subsequent precedent (either a "new rule" or old rule clarifying or overturning prior lower federal court precedent) to uphold the presumptively valid state court judgment. That issue is presented in this case.

Normally, a habeas petitioner would not seek the announcement or application of a new rule on collateral review unless the petitioner benefitted by it. *See, e.g., Wright v. West*, 112 S.Ct. ___, 118 L.Ed.2d ___, 60 U.S.L.W. 4639, 4648 (1992) (Souter, J., concurring). Consequently, this issue will not arise in most habeas proceedings since petitioners generally lack sufficient incentives to present the question. However, in a small class of cases, the State will not only have the incentives to seek application of the new rule, but the criminal justice interests in finality and comity will call for its application.

This "converse" circumstance where the State (instead of the habeas petitioner) would seek to apply subsequent precedent on collateral review will ordinarily arise in two manners: (1) when a state court has made a ruling against a defendant that is challenged as erroneous at the time of the state trial, but would not be invalid in light of subsequent precedent on federal habeas review; or (2) as in this case, when a habeas petitioner or defendant contends that his counsel failed to raise an objection or investigate an issue that would have been meritorious at the time of the state proceeding, but would no longer be valid in light of subsequent precedent.[16]

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[16] While this Court has already *suggested* in passing that "a State could . . . rely on a decision announced after a petitioner's conviction and sentence

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The ability of the States to rely on the new precedent is consistent with the finality and comity interests underlying the *Teague* doctrine. If, under the *Teague* doctrine, States may correctly defend state court judgments that were reasonable at the time of the state court proceeding, but subsequently proven to be erroneous, then concomitantly States should be able to defend those state court judgments when the subsequent precedent has proven to be correct and reasonable under current law as long as the fundamental fairness of the proceeding has been unaffected by the retroactive application of the subsequent precedent. As this Court has established this proposition in the related situation where habeas petitioners seek retroactive application of a new rule, the *Teague* doctrine "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827, 111 L.Ed.2d at 206; *see also Butler*, 494 U.S. at 415 (considering whether proposed rule "was susceptible to debate among reasonable minds"). It only follows that if the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be *contrary* to later decisions," *Butler*, 494 U.S. at 414 (emphasis added), then the finality and comity principles underlying the *Teague* doctrine should also serve to ratify state court applications of law which are subsequently proven to be *correct*, notwithstanding, as here, contrary intermediate federal precedent.

Three scenarios[1] illustrate the potential ramifications of the Eighth Circuit majority ruling on the *Strickland* standard and the principles underlying the *Teague* doctrine. These examples include the circumstances where:

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became final to defeat his claim on the merits," it has not directly considered this issue. *Stringer*, 112 S.Ct. at 1139, 117 L.Ed.2d at 382. This case therefore presents an opportunity for this Court to hold that States may assert subsequent corrective precedent on Sixth Amendment claims where the fundamental fairness and reliability of the proceeding would not be affected.

(1) as under the facts of this case, the subsequent precedent did not establish a "new rule" within the meaning of *Teague* (and the State would benefit by the retroactive application of this precedent);

(2) the habeas petitioner would benefit by precedent available at the time of the State proceeding but would not by the subsequent "new rule" (and the State would benefit by the retroactive application of the "new rule"); and

(3) the petitioner would benefit by a "new rule" but would not by precedent at the time of the State proceedings.

Under each scenario, the two hypothetical situations where the State would seek to apply subsequent precedent on collateral review are considered: *first*, when the state court makes a ruling which is challenged as erroneous at the time of the state trial but which is subsequently proven to be correct; and *second*, when an ineffectiveness claim is asserted for the failure of defense counsel to raise an objection based upon precedent applicable at the time of the trial but which precedent is subsequently invalidated.

A. Scenario One: Subsequent Precedent Is Not A "New Rule"

The first scenario pertains to the facts of the instant case. In *Perry v. Lockhart*, the Eighth Circuit overruled its decision in *Collins* and noted that the *Perry* ruling is not a "new rule" within the meaning of *Teague*.[17] Under either hypothetical

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[17] The *Perry* court held that its holding did not constitute a "new rule" because overruling *Collins* was a direct extension of this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *See Perry*, 871 F.2d at 1394 & n.8 (noting *Lowenfield* "did not announce a new rule" because it "merely applied a rule that had been announced in *Jurek* [*v. Texas*, 428 U.S. 262 (1976)]"); *see also Fretwell*, 946 F.2d at 579 (Loken, J., dissenting) (noting under *Perry*, *Lowenfield* did not establish a new rule and should be applied retroactively).

Arguably then, even prior to *Lowenfield*, the *Perry* holding was an extension of *Jurek*. It could be because of this Court's holding in *Jurek* that defense counsel

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situation, the State should be permitted to assert the *Perry* holding on collateral review since the fundamental fairness or the reliability of the sentencing phase of the trial will not be affected by doing so.

1. Initial State Court Ruling Challenged As Erroneous

The first hypothetical involves the situation where the state court makes an initial ruling which is challenged as erroneous based upon precedent at the time of the state proceeding. We may assume that – unlike the specific facts of this case – defense counsel actually objected to the jury instruction on pecuniary gain as an aggravating circumstance, relying upon *Collins*. The state court nonetheless overrules the objection and gives the instruction. After the state trial, but before collateral review, the *Perry* decision is announced, which permits the pecuniary gain instruction. Nevertheless, the defendant files a habeas petition challenging the state trial court's instruction in light of *Collins*.

In this situation, consistent with the *Teague* doctrine, the State would properly assert the *Perry* holding, which would apply retroactively on collateral review because *Perry* is not a new rule. Although *Perry* did not rely directly upon the *Teague* doctrine, there is no doubt that *Lowenfield* is not a "new rule" since it did not constitute the application of an "old rule" (i.e., *Jurek*) in a manner that was not dictated by precedent. *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 377. Since *Perry* is clearly an "old rule," no retroactive application of a "new" rule is raised by its application. Importantly, only by applying *Perry* retroactively on collateral review may a constitutional windfall be avoided and may the criminal justice interests in comity and finality be promoted in this situation.

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did not raise a *Collins* objection at the time of the sentencing hearing (i.e., the motion would have been futile). At least one federal court has distinguished *Collins* for failing, in part, to discuss *Jurek*. *See McKenzie*, 842 F.2d at 1539 n.30.

2. Sixth Amendment Ineffectiveness Claim

The alternative hypothetical situation concerning an ineffective assistance of counsel claim represents the facts actually presented in this case. Here, defense counsel failed to raise a *Collins* objection during the state sentencing phase. Prior to collateral review, *Collins* was overruled in *Perry*, which, as already noted, is not a new rule within the meaning of *Teague*. *See* note 17, *supra*. On federal habeas review, respondent has alleged ineffective assistance of counsel because his trial attorney failed to raise the *Collins* objection.

In contrast to the prior example, involving review of a state court ruling, this illustration places the conduct of defense counsel in issue.[18] Specifically, under the Sixth

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[18] At first glance it might appear that the focus of Sixth Amendment ineffective assistance of counsel habeas claims is wholly distinct from other non-Sixth Amendment habeas claims. In fact, these claims are closely related for two separate reasons.

First, it is true that other habeas claims may call into question the conduct of other actors, including the *judge*, *prosecutor*, *jury*, *law enforcement*, or other officials. *See, e.g.*, note 22, *infra* (noting myriad of ways by which similar habeas issues may be presented concerning similar questions of law). In contrast, Sixth Amendment habeas claims require review of the conduct of the petitioner's *defense counsel*. However, the common thread among these claims is the impact these collateral attacks may have on the criminal justice interests in finality and comity.

Second, there is a common thread between claims reviewed under the *Teague* doctrine and Sixth Amendment claims in that both involve review of State action. For example, in considering the application or announcement of a rule on collateral review sought by a habeas petitioner, a federal habeas court, under the *Teague* doctrine, focuses on the rulings of the *state court*. *See Saffle*, 494 U.S. at 488 (In determining "what constitutes a new rule, [the] task is to determine whether a *state court* considering [the] claim at the time [the] conviction became final would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution.") (emphasis added); *Butler*, 494 U.S. at 414 ("The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by *state courts* even though they are shown to be contrary to later decisions.") (emphasis added). While it is defense counsel's conduct that precipitates a Sixth Amendment violation, this conduct is imputed to the State. *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2567, 115 L.Ed.2d at 672 (noting that "it is not the gravity of the attorney's error

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Amendment *Strickland* standard, the question is whether the failure to object *prejudiced* the outcome of the sentencing proceeding. Only because the Eighth Circuit majority required the application of *Collins* as the law *at the time of the state trial* and precluded the application of *Perry on collateral review* for purposes of determining prejudice under the *Strickland* standard, was respondent able to obtain a constitutional windfall on grounds of ineffective assistance of counsel.

For reasons analogous to the first hypothetical, the State should be able to rely on *Perry* to rebut the Sixth Amendment claim. The failure of defense counsel to object to the pecuniary gain instruction has not affected the fundamental fairness and reliability of the trial – there is no reason to lose confidence in its outcome. *See Kimmelman*, 477 U.S. at 395 (Powell, J., concurring). There is no reason why *Perry*, an "old rule," should not apply and its application does not raise any due process questions.[19]

As demonstrated by this first scenario, unless the Eighth Circuit majority ruling is reversed by this Court, two related consequences will expectedly follow in the Sixth Amendment context. *First*, absent a contrived Sixth Amendment claim, the constitutional windfall will not be available since the case will be governed by the precedent, the "old rule," in place at the time of collateral review. *Second*, and concomitantly, such

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that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.*, 'imputed to the State' "); *Kimmelman*, 477 U.S. at 379 ("The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.") (and citations therein).

[19] *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (retroactive application of new precedent may not offend due process); *see also Hunt*, 899 F.2d at 881 (retroactive application of state court ruling did not constitute a change in the law and therefore did not violate any due process rights); *accord Washington v. Murray*, 952 F.2d 1472, 1480-81 (4th Cir. 1991) (retroactive application of *Payne v. Tennessee* would not offend due process).

Sixth Amendment claims will be used to undermine the finality and comity interests of the state explicated in *Teague* without advancing the purpose of federal habeas review.

B. Scenario Two: Petitioner Benefits By Precedent Available At The Time of the State Proceedings But Not By The Subsequent "New Rule"

A new hypothetical example also at the capital sentencing stage demonstrates that, in limited circumstances, the State should be able to assert "new rules" retroactively on collateral review to uphold presumptively valid state court judgments. As will be shown, this retroactive application of a new rule to uphold state court judgements is actually consistent with the *Teague* doctrine and the Powell-*Kimmelman* approach of balancing finality and comity with the Constitution's interest in ensuring a fundamentally fair and reliable proceeding.

1. Sixth Amendment Ineffectiveness Claim

In *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), this Court held that the Eighth Amendment precludes the admission of victim impact evidence or a prosecutor's statements concerning the personal qualities of the victim during the sentencing phase of a capital trial. Suppose, for purposes of the hypothetical, that the ineffective assistance of counsel claim was predicated on a failure to object to the introduction of victim impact evidence or prosecutorial statements during the penalty stage of a capital case under either *Booth* or *Gathers*, which governed *at the time of the state capital proceeding*. Assume further that *at the time of federal habeas review*, *Payne v. Tennessee*, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), had been rendered, which explicitly overruled *Booth* and *Gathers*, and removed the bar against the admission of such victim impact evidence or statements. Finally, assume that the evidence introduced into the penalty phase proceeding was clearly admissible as it was identical to that presented and upheld in *Payne*.

It is clear that *Payne* constitutes a new rule under the *Teague* doctrine, as it was not dictated by prior precedent and certainly broke new jurisprudential ground.[20] Analogous to the facts of the present case, the contention of the hypothetical habeas petitioner would be that ineffective assistance of counsel was rendered by the failure to object under *Booth* or *Gathers*, which applied during the state sentencing phase. Normally, under the *Teague* doctrine, a new rule is not retroactively applied on collateral review unless the rule falls within one of two narrow exceptions. *See* note 10, *supra*. However, in light of the subsequent holding in *Payne*, granting Sixth Amendment relief on habeas review on the basis of *Booth* and *Gathers* would be nothing other than a constitutional windfall. Simply put, in the absence of an unfair or unreliable proceeding, no showing of prejudice has been demonstrated for purposes of the Sixth Amendment.[21]

Realistically, because the new rule in *Payne* would not benefit the typical habeas petitioner, it is unlikely that a habeas petitioner would seek its application on collateral review. *But see Robison*, 943 F.2d at 1217-18 (determining whether *Payne* required reversal of prior federal appellate court holding concerning admissibility of victim impact evidence). However, under this scenario the habeas petitioner who can present a Sixth Amendment claim based upon the rationale of the Eighth Circuit majority opinion would be

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[20] *See, e.g., Saffle*, 494 U.S. at 488 ("The explicit overruling of an earlier holding no doubt creates a new rule."); *Butler*, 494 U.S. at 412 ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.' "); *Teague*, 489 U.S. at 301 (plurality opinion); *see also Robison v. Maynard*, 943 F.2d 1216, 1217-18 (10th Cir. 1991) (suggesting, in alternative holding, that *Payne* constitutes a "new rule" under the *Teague* doctrine).

[21] *See Kimmelman*, 477 U.S. at 395 (Powell, J., concurring); *see also Washington*, 952 F.2d at 1480-81 (on ineffectiveness claim for failure to object under *Booth*, holding that even assuming *arguendo* that ( ) counsel should have anticipated *Booth*, or (2) *Booth* was retroactively applicable at the time of trial, no prejudice could be demonstrated because *Booth* had subsequently been overruled by *Payne* which would apply on resentencing).

rewarded with habeas relief.[22] This scenario, similar to the facts currently before the Court, demonstrates one of the rare situations when the State should be able to rely on a new rule in order to uphold the state court judgment *as long as* the fundamental fairness of the proceeding is not put into question. The costs to the criminal justice interests in finality and comity cannot otherwise be justified.

2. Initial State Court Ruling Challenged As Erroneous

Although these facts are not currently before the Court, for the sake of completeness, we may consider the situation where the state trial court erroneously permits the introduction of victim impact evidence or prosecutorial statements over defense counsel's objection. It is clear under our hypothetical that at the time of the state trial this ruling violated *Booth* or *Gathers*. However, at the time of federal habeas review, *Payne* had been rendered. In our hypothetical, there is no dispute over the admissibility of the evidence as the evidence is identical to that found admissible in *Payne*. The State would seek to rely on the new rule in *Payne* to defend the state court judgment. Only where the fundamental fairness or reliability of the proceeding would be undermined by the retroactive application should the State be barred from asserting the new rule.[23]

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[22] A myriad of habeas claims might be asserted, including challenges to: (1) the admission of evidence; (2) the trial court's jury instruction; (3) the statements of the prosecutor; (4) the failure of defense counsel to object to the jury instruction; or (5) the failure of defense counsel to object to the admission of evidence.

[23] *Compare Bouie*, 378 U.S. at 353-54 (retroactive application of new precedent may not offend due process) *and Marks v. United States*, 430 U.S. 188, 196 (1977) (Due Process Clause precludes retroactive application of judicially announced standards which may impose criminal liability for conduct not previously punishable) *with Osborne v. Ohio*, 495 U.S. 103, 116-17 (1990) (due process not offended where there is fair notice that the conduct is criminal).

C. Scenario Three: On Sixth Amendment Ineffectiveness Claim, Petitioner Benefits By "New Rule" On Collateral Review But Not By Precedent At The Time of the State Proceedings

Finally, assume that the holding in *Payne* applied *at the time of the state sentencing phase* and permitted the introduction of victim impact evidence. Our hypothetical counsel fails to object to two separate pieces of victim impact evidence, one which meets the Eighth Amendment admissibility standard under *Payne*, the other violating the more stringent Due Process Clause standard reiterated in *Payne*, 111 S.Ct. at 2608, 115 L.Ed.2d at 735. Then assume, *arguendo*, that *at the time of federal habeas review*, the *Booth* and *Gathers* decisions had been rendered, expressly overruling the Eighth Amendment rule of admissibility of *Payne*. The new *Booth* and *Gathers* decisions would constitute a new rule within the meaning of *Teague*, *compare* note 20, *supra*, and would not apply retroactively on collateral review unless one of the two *Teague* exceptions were satisfied. *See* note 10, *supra*.

Under this example, the habeas petitioner would seek the benefit of the new rules under *Booth* and *Gathers* in an ineffective assistance of counsel claim, relying upon the rationale of the Eighth Circuit majority ruling. As to the evidence which would have been admissible under *Payne*, no ineffective assistance of counsel claim can be established since no lawyer could have anticipated either *Booth* or *Gathers* and no prejudice could be established. In contrast, an objection should have been raised to the evidence which would have violated the long-standing due process standard repeated in *Payne*. Under this latter situation, it would not necessarily constitute a windfall to grant relief on Sixth Amendment grounds as the fundamental fairness and reliability of the state sentencing proceeding arguably may have been affected by the introduction of the victim impact evidence in violation of the Due Process Clause.[24]

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[24] Alternatively, assume that the hypothetical defense counsel objected to the introduction of both pieces of victim impact evidence at the sentencing

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D. Summary

These three scenarios illuminate the potential impact of the Eighth Circuit majority ruling on the principles underlying the *Teague* doctrine and the prejudice component of *Strickland*. In the limited circumstances noted, in order to avoid a constitutional windfall, States should be permitted to assert subsequent precedent on collateral review to uphold presumptively valid state court judgments. Only where the fundamental fairness of the state proceeding would be undermined by this retroactive application of precedent should the State be precluded from asserting the subsequent precedent. In assessing prejudice on a Sixth Amendment claim, the fundamental fairness of the retroactive application of the intervening precedent can be measured under the standard proposed by Justice Powell. *See Kimmelman*, 477 U.S. at 396, 397 (Powell, J., concurring). Although the issue is not raised in this case, it is worth noting the parallelism with the situation where a State would seek to rely upon new precedent where an initial state court ruling is challenged. In this context, the fundamental fairness of the retroactive application

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hearing. At the time of the trial, the first evidence would be admissible under *Payne*, while the second evidence would not be. Assume, then, that the state trial court admits both pieces of evidence, overruling defense counsel's objection. Before federal habeas review, *Booth* and *Gathers* are handed down.

On collateral review, the habeas petitioner might seek retroactive application of *Booth* and *Gathers*. In this situation, unless the petitioner could successfully argue that one of the *Teague* exceptions would permit the retroactive application of the new rule, neither *Booth* nor *Gathers* would be retroactively applied. This is consistent with the retroactivity analysis adopted by this Court. If *Booth* and *Gathers* had come down at any point during the direct review process, then the hypothetical defendant would be able to obtain the benefit of these new rules. *See Griffith*, 479 U.S. at 328. Because in the hypothetical example the new rules were rendered after the conviction became final, the *Teague* doctrine advances the interests in finality and comity by barring the retroactive application of the new rules unless one of the two narrow exceptions applies. *See Teague*, 489 U.S. at 309-10 (noting finality and comity interests). *Independent* of requesting application of the new rules, the habeas petitioner may challenge the propriety of the state court ruling admitting evidence which violated the due process standard reaffirmed in *Payne*.

would be governed by the due process standard. *See Marks*, 430 U.S. at 196; *Bouie*, 378 U.S. at 353-54; *see also Hunt*, 899 F.2d at 881. In both circumstances, where the fundamental fairness would not be implicated, the criminal justice interests in finality and comity would be promoted by the retroactive application.

Unless the States can assert the subsequent precedent in this case and under similar circumstances, several consequences will likely follow. *First*, neither the purpose of habeas review nor of the Sixth Amendment will be advanced and the presumptively valid state court convictions and sentences will be upset. Arguably, the interests in finality and comity under these circumstances is even more compelling than that noted in *Teague*, since subsequent precedent has established the legitimacy of the initial state court ruling or conduct of counsel in question.

Second, the finality and comity interests underlying the *Teague* doctrine will be undermined. Further, because of the constitutional windfall at stake under the Eighth Circuit majority opinion, habeas petitioners will have tremendous incentives to dress up claims based on "old rules" in the clothes of ineffective assistance of counsel claims in order to obtain habeas relief.

Third, the Eighth Circuit majority ruling will also undermine the prejudice component of the *Strickland* standard. The Eighth Circuit majority presumed that both prongs of the *Strickland* test required a mechanical application and evaluation of precedent prevailing at the time of the state trial. In a footnote, the Eighth Circuit majority observed that the Eighth Circuit's *Perry* decision overruling *Collins* was not dispositive since "the question before us is whether Fretwell's [state] trial court, *at the time of his trial*, would have followed *Collins*." *Fretwell*, 946 F.2d at 577 n.8 (emphasis in original). The majority concluded "that a reasonable state trial court" would have sustained a *Collins* objection if one had been made since *Collins* constituted valid precedent at the time of the trial and "state courts are bound by the Supremacy Clause to obey federal constitutional law." *Id.* at 577.

Instead, *Strickland* only teaches that hindsight and second-guessing of counsel's performance must be eliminated in assessing the performance component of *Strickland*. *See Strickland*, 466 U.S. at 689. The *Strickland* standard does not dictate – nor should it – such a constrained and rigid application of the prejudice prong. Because "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged," this Court rejected such a mechanical approach. *Id.* at 696 (emphasis added).

As has been demonstrated, it is entirely consistent with the principles of the *Teague* doctrine and the Sixth Amendment to allow the State to seek application of what would constitute a "new rule" in *some* habeas cases for purposes of assessing prejudice under the *Strickland* standard. Both the Powell-*Kimmelman* prejudice standard and the *Teague* doctrine seek to preclude a "constitutional windfall" which would undermine the function of habeas review and disregard the criminal justice interests in finality and comity.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be reversed.

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Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

WARD A. CAMPBELL
Deputy Attorney General

*MARK L. KROTOSKI
Special Assistant Attorney General

1515 K Street, Suite 603
Sacramento, CA 95814
(916) 324-5497

Attorneys for Amici
*Counsel of Record